REMARKS

Applicants have carefully reviewed this Application in light of the Office Action mailed March 2, 2009 Claims 1-20 are pending in this Application and Claims 1-20 stand rejected under 35 U.S.C. § 102(e). Applicants respectfully request reconsideration and favorable action in this case.

Rejections under 35 U.S.C. § 102

Claims 1-20 were rejected by the Examiner under 35 U.S.C. § 102(e) as being anticipated by U.S. Patent No. 6,801,777 issued to Leslie A. Rusch ("*Rusch*") Applicants respectfully traverse and submit that *Rusch* does not teach all of the elements of the claimed embodiment of the invention.

"A claim is anticipated only if each and every element as set forth in the claim is found, either expressly or inherently described, in a single prior art reference." *Verdegaal Bros. v. Union Oil Co. of California*, 814 F.2d 628, 631, 2 U.S.P.Q.2d 1051, 1053 (Fed. Cir. 1987). Furthermore, "the identical invention must be shown in as complete detail as is contained in the ... claim." *Richardson v. Suzuki Motor Co. Ltd.*, 868 F.2d 1226, 1236, 9 U.S.P.Q.2d 1913, 1920 (Fed. Cir. 1989). Applicants respectfully submit that the art cited as anticipatory by the Examiner cannot anticipate the rejected Claims, because the cited art does not show all the elements of the present Claims.

Applicants respectfully submit that *Rusch* fails to, either expressly or inherently, teach every element of Applicants' claims as amended. For example, regarding amended Claim 1, *Rusch* fails to teach at least:

> receiving from a user a ranking of one or more performance factors displayed to the user to be used in determining whether to dynamically switch between network protocols;
> while conducting network communications with the first network protocol, automatically determining whether switching from the first network protocol to the second network protocol would improve performance for the client system based at least on the user's ranking of the one or more performance factors;

As noted in Applicants' previous response, *Rusch* does not teach receiving a <u>user's ranking of performance factors</u> that are displayed to the user, much less automatically determining whether switching from one network protocol to another network protocol would improve system performance <u>based at least on the user's ranking of the performance factors</u>.

In reply to this argument, the Examiner argues that *Rusch* teaches user ranking of performance factors at Col. 2, lines 27-41 and Col. 5, line 55 - Col. 6, line 11. (Office Action, Page 10). These portions of *Rusch* state in full:

> FIG. 1 is a simplified functional block diagram of a portion of a wireless communication device in accordance with an embodiment of the present invention. Wireless communication device 100 characterizes available networks to determine current network information, and may select one of the available networks based on the current network information and at least one of user preferences, application requirements and system information. Wireless communication device may be any communication device including, for example, a notebook or laptop computer, a personal digital assistant (PDA), a mobile data terminal, wireless telephone, digital camera, video camera or other multimedia device, and may include functional combinations thereof. For simplicity, all functional elements of device 100 may not be illustrated in FIG. 1.

(Col. 2, lines 27-41).

> User preferences stored in element 116 may include a user's preferred communication carrier, quality preferences, power constraints, and privacy preferences. The user's quality preferences may include different quality of service tolerances and/or preferences for different types of communications and may vary depending on the particular application. For example, the user may prefer a more stable lower-quality video over a less stable higher-quality video; the user may prefer that lower power communications be selected if he/she relies heavily on battery power; or the user may prefer lower cost communications or a particular carrier or service provider for certain types of communications. User preferences may, for example, indicate that when the battery is low, the user desires communication links requiring lower power or that links with increased bit-error-rates are acceptable. In one embodiment, user preferences may be stored in a memory element such as a smart card or token which may be inserted into device 100. User preferences may be input by user through I/O 122. Wireless connectivity assistant 112 pulls together the user preferences, application requirements, and system information to make an intelligent selection among the available communication networks. Desirably, wireless connectivity assistant 112 operates without user intervention providing the user with a more gratifying wireless communication experience.

(Col. 5, line 55 - Col. 6, line 11).

Applicants submit that these portions of *Rusch* cited by the Examiner contemplate at most a user setting one or more preferences in a computer system. However, the cited portions disclose nothing about "ranking" of such preferences by a user. Applicants have submitted herewith an Information Disclosure Statement setting forth definitions for the verb "rank," as set forth in the Merriam-Webster Online Dictionary. As defined therein, "rank" means, among other things, "to arrange in lines or in a regular formation," "to determine the relative position of : rate," "to take precedence of," "to take or have a position in relation to others." (http://www.merriam-webster.com/dictionary/rank[3]). Applicants note that the portions of *Rusch* cited by the Examiner are silent to a user determining a relative position of, precedence of, position of, or ordering of preferences. Accordingly, *Rusch* cannot be held to disclose "ranking" of preferences by a user, let alone a selection of a network protocol based on such ranking.

For at least these reasons, Applicants respectfully request reconsideration and allowance of amended Claim 1, as well as all claims that depend from amended Claim 1. In addition, for analogous reasons, Applicants request reconsideration and allowance of amended independent Claims 8 and 15, as well as all claims that depend therefrom.

Information Disclosure Statement

Applicants enclose an Information Disclosure Statement ("IDS") and PTO Form 1449, with a copy of the reference for the Examiner's review and consideration. Applicants authorize the Commissioner to the charge $180.00 IDS fee and any fees necessary to Deposit Account 50-2148 of Baker Botts L.L.P.

CONCLUSION

Applicants have made an earnest effort to place this case in condition for allowance in light of the amendments and remarks set forth above. Applicants respectfully request reconsideration of Claims 1-20.

Applicants enclose an Information Disclosure Statement ("IDS") and PTO Form 1449, with a copy of the reference for the Examiner's review and consideration. Applicants authorize the Commissioner to the charge $180.00 IDS fee to Deposit Account 50-2148 of Baker Botts L.L.P. Applicants believe there are no additional fees due at this time; however, the Commissioner is hereby authorized to charge any fees necessary or credit any overpayment to Deposit Account No. 50-2148 of Baker Botts L.L.P.

If there are any matters concerning this Application that may be cleared up in a telephone conversation, please contact Applicants' attorney at 512.322.2684.

Respectfully submitted,
BAKER BOTTS L.L.P.
Attorney for Applicants

Brian K. Prewitt
Reg. No. 60,135

Date: _May 28, 2009_

SEND CORRESPONDENCE TO:
BAKER BOTTS L.L.P.
CUSTOMER ACCOUNT NO. **23640**
512.322.2684
512.322.8383 (fax)